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No. 541

IN THE

SUPREME COURT OF THE UNITED STATES

LOUIS LeLAURIN
Petitioner

v

FROST NATIONAL BANK, TRUSTEE et al
Respondents

RESPONDENTS' REPLY BRIEF TO PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI

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Preliminary Statement

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Respondent, FROST NATIONAL BANK OF SAN ANTONIO, Trustee under the Will of Jack Ammann, Deceased, respectfully presents herewith its brief reply to the Petitioner's application for Writ of Certiorari to this Court. Respondent has not been furnished with a copy of the certified record filed in this Court and apologizes for its inability to refer to it.

JURISDICTION

Respondent respectfully submits that Petitioner presents no grounds of jurisdiction for the intervention of this Court.

His first ground is that the decision of the Circuit Court of Appeals is in conflict with the decision of another Court

of Appeals. He does not name the decision with which he claims there is a conflict. If he contends that the decision in this case is in conflict with Webster Drilling Co. v. Walker, 286 F 2d 114, even a casual reading of this decision will show that it has no application whatever to the issues in this case. Clearly, he has demonstrated no conflict.

His next ground is that the decision of the Circuit Court of Appeals "involves an extremely important question of Federal law." Actually, the decision does not involve a question of Federal law, but merely involves the proper construction of the State Law. Petitioner, in his Brief in the Circuit Court of Appeals, in referring to the case of Security Mortgage Co. v Powers, 278 U.S. 149, says:

> "According to Powers, supra, the validity and construction of the claim for attorneys' fees as part of Appellee's claim presented by Appellant must be viewed from the standpoint of Texas law."

This was the holding of the Powers case, and Petitioner, himself, admits that the question involved in this case is one based upon State law, not Federal law. Neither is the matter one of importance save to Petitioner, himself. It would only become important if this Honorable Court chose to overturn the decision of the Circuit Court of Appeals, for, in that event, it would be establishing a completely new rule of law which is not supported by any authority in the United States.

Surely, Petitioner shows no reasonable grounds for this Court to assume jurisdiction.

QUESTION PRESENTED

Petitioner presents no assignments of error. He merely says under his title "Question Presented:

> "Whether the State or the Federal Courts shall determine allowances against bankrupt estates for attorneys' fees upon claims allowed by a referee in bankruptcy?"

The above quotation, which Petitioner appears to advance as the question to be decided by this Court, is a complete misconception of the issue in this case. No such issue is now or ever was involved in this case. Petitioner's statement would appear to be an effort to present to this Court something that might appeal to it which is actually not in the case at all.

The issue in this case is very simple. No one has questioned the authority of the Bankruptcy Court to determine the amount of attorneys' fees allowed to a claimant upon his claim. What Petitioner contends is that this allowance is also a determination of the amount of the fee the claimant must pay his attorney.

Respondent, the Bank (as it will hereafter be referred to), as Trustee of a Testamentary Trust, held a note, secured by real estate, upon which, at the time of the bankruptcy, there was owing the sum of $333,056.38. The note was in the usual form, providing for 10% attorneys' fees if placed with an attorney for collection. The Bankruptcy Court allowed the claim in full as a secured claim, but, instead of allowing the full 10%, allowed $25,000.00 attorneys' fees to the holder of the note. The real estate was worth much less than the balance owing upon the note and was accordingly abandoned by the Trustee in bankruptcy and its appraised value was credited upon the Bank's claim in the manner provided by the bankruptcy laws leaving a balance owing on the unsecured claim, including the attorneys' fees, of $133,056.38.

Petitioner's contention in the Trial Court was that the allowance of the $25,000.00 attorneys' fees to his client, the

Bank, was, in effect, the allowance of this amount to him and that this amounted to a legal adjudication that his client owed him $25,000.00 (C.C.A. Record Page 1). This contention was made despite the fact that, admittedly, there was no hearing on the matter as between himself and his client and that his client had no representation before the Bankruptcy Court except by himself. When this contention was overruled by the District Court, Petitioner, in the Circuit Court of Appeals, then contended that the allowance of the $25,000.00 attorneys' fees to his client gave him, as a matter of law, a proportionate part (25,000/358,056.38) of the value of everything that the Bank recovered on its claim, which he computed to be $16,798.38.

Petitioner cites no case and Respondent is confident that no case can be found by any Court in the United States which supports the rule contended for by him. The cases cited by him on Page 23 of his Petition for Certiorari have absolutely no application to this question. Despite the fact that attorneys' fee provisions are standard in promissory notes in Texas and in many other states and that there must be tens of thousands of cases in which attorney fees have been allowed to the holders of notes, Respondent has been able to find only two cases in the legal reports in the United States in which any one has made a contention similar to that advanced here by Petitioner. In both of these cases (one of which is from Texas) the contention was rejected on the ground that the allowance was made to the holder of the note as indemnity to him and his attorney had no interest in it. Groves-Barnes Lumber Company v Freeman, Tex. Civ. App., 33 S.W.2d 218. Dublin Veneer Company v Chappel and Burch, 31 Ga. App. 700, 121 S.E.866.

The Circuit Court of Appeals held that any dividends collected by the Bank from the Bankrupt Estate which were

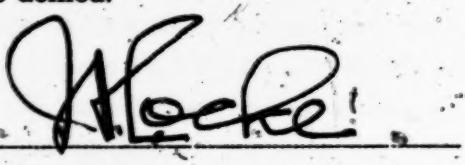
attributable to the $25,000.00 attorney fee allowed to it, must be paid to the Bank's attorney or returned to the Bankrupt Estate. This, of course, is based upon the equitable rule that a creditor would not be permitted to obtain a preference over other unsecured creditors by receiving a dividend upon the sum allowed to him as attorneys' fees when he actually did not owe the attorney fees. In our case, the only dividends collected by the Bank upon its claim, which were attributable to the increase of its unsecured claim by the allowance of the $25,000.00 attorneys' fees, amounted to $2,930.00. The Bank had already paid its attorney $2,500.00 and conceded in its Brief in the Circuit Court of Appeals that the attorney would probably be reasonably allowed at least the total sum of $2,930.00 and expressed a willingness to pay him that amount. Thus, as the Circuit Court of Appeals said, there seemed to be very little likelihood that anything would have to be returned to the Bankruptcy Court.

CONCLUDING REMARKS

Rspondent, the Bank, has never questioned the right of Petitioner to a reasonable fee, but, as a Trustee, it did not feel authorized to pay him more than a reasonable fee. If the Petition for Certiorari is denied, Petitioner will be awarded and paid a reasonable fee under the order of the State Court in Respondent's suit for a declaratory judgment to determine the amount of the fee. He will not be prejudiced in any way. The opinion of the Circuit Court of Appeals correctly states the facts and follows the settled law and is sound and equitable. To adopt Petitioner's theory would make it unsafe for a note holder to place his claim with an attorney for collection without agreeing in advance on the fees to be charged. It would not seem that this Hon-

orable Court would care to concern itself with passing upon a theory so novel and so completely unsupported by any authority and which would not appear to be in the public interest. Nor would it seem equitable to burden the trust which Respondent is administering with the very substantial cost of another hearing.

Respondent respectfully prays that Petitioner's motion for a Writ of Certiorari be denied.



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CERTIFICATE

I, John R. Locke, attorney of record for Respondent, Frost National Bank of San Antonio, Trustee, hereby certify that a true and correct copy of the above and foregoing reply brief has been served upon all other parties to these proceedings, or their counsel, by placing the same in the United States Mail with the proper amount of postage affixed thereto and properly addressed to them as shown below on the_____day of October, 1968.

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